IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. CALVIN LEE WHITE, Appellant.	)	DIVISION ONE No. 56562-1-I (Consolidated with No. 56563-0-I) **UNPUBLISHED OPINION** FILED: September 18, 2006

PER CURIAM. In these consolidated appeals, Calvin White challenges his convictions at separate trials of possession of controlled substances and bail jumping. White contends that there was insufficient proof of his possession of marijuana and methamphetamine, alleges that his trial counsel rendered ineffective assistance by failing to understand the law regarding consecutive sentences and failing to obtain a consolidated sentencing hearing, and argues that the court should have imposed a victim penalty assessment in only one of his sentences.

Reasonable inferences from the circumstantial evidence supported a conclusion that White actually possessed the controlled substances before police apprehended him. White's citations to his counsel's in-court statements do not meet his burden of showing that counsel's out-of-court performance was deficient or prejudicial. And White has not shown that the court erred in imposing two victim penalties at two separate sentencing hearings for two sets of crimes following two trials. White's

additional pro se allegations of error are also without merit. We affirm.

FACTS

In a proceeding not on appeal here, White was convicted of possession of controlled substances and directed to appear in Snohomish County Superior Court for sentencing on February 22, 2005.[1] He failed to appear and the court issued a bench warrant. White's counsel arranged a hearing for him to appear to quash the warrant the next day, but he failed to appear then as well.

On the evening of April 7, 2005, a sheriff's deputy was summoned to a rural location in Snohomish County to investigate a trespassing complaint by White's neighbor. After learning White's relatives were among the suspects, the deputy checked for warrants and learned of White's outstanding felony warrant.

Deputies entered the property and found White. When they told him he was under arrest for the warrant, he began to walk away from them, but stopped after an officer made the presence of a police dog known. The deputies arrested White and found him in possession of a marijuana pipe. They then walked along the route White had taken after they confronted him and before he stopped, and discovered a brown leather pouch, noticeably drier than the wet foliage around and under it. Inside the pouch was a baggie containing a crystalline substance that later proved to be methamphetamine. When White overheard one deputy's comment to another about methamphetamine, he remarked, "I thought that we ran out of that yesterday."[2] The leather pouch also contained marijuana. As the deputies took White into custody, he

[1] See State v. Calvin Lee White, No. 56280-0-I.
[2] Record of Proceedings (6/27-28/05) at 34.

repeatedly asked the officers to dispose of the methamphetamine and offered to plead guilty to the marijuana if they did.

White was charged in one information with bail jumping for failing to appear in court on February 22, and one count each of felony possession of methamphetamine and misdemeanor possession of marijuana on April 7. On White's motion, the court severed the bail jumping charge from the drug charges.

The first trial, on the bail jumping charge, took place on June 20, 2005. As the court heard motions in limine, the prosecutor placed the State's plea offer on the record. The prosecutor noted the State had offered to dismiss the bail jumping charge in exchange for a plea on the controlled substances charges, the standard range for which would be 12 months and a day to 24 months. The State would recommend the high end and White could ask for the low end. The prosecutor added that the bail jumping charge alone carried a standard range of 22 to 29 months, and noted conviction of all offenses would raise White's offender score and increase the range to 33 to 43 months. Defense counsel commented that White had been aware of the State's offer for a month, understood it, and had repeatedly rejected it.

White testified in his defense that he had not written down the correct time of his sentencing, and arrived late to find "there was no one there."[3] He had intended to appear at the quash warrant hearing the next day, but could not because he had been severely injured on his way to court by hot water from his truck's radiator. He had spent the next two months convalescing under his own care until he was arrested in

[3] RP (6/20/05) at 53.

April. In rebuttal, the State called one of the deputies that arrested White on April 7. He testified White had shown no signs of injury and made no claim of accident or injuries. The jury found White guilty.

The second trial, before a different judge in a different courtroom, began on June 27. White did not testify in this trial, which focused on the circumstances and location of his arrest and his statements to police. He was found guilty.

White was sentenced on the bail jumping conviction on June 29. The State requested a high-end sentence, noting that White's offender score had increased because of the jury verdict on the methamphetamine charge. Defense counsel asked for an exceptional sentence downward, proffering White's trial testimony in mitigation and representing that he, counsel, had not understood the law that an offender score point for White's latest conviction would be added even though White had not yet been sentenced. Counsel reported White had said that had he known the standard range was 33 to 43 rather than 22 to 29 months, he would have taken the State's offer. The court commented that it had been clearly placed on the record before trial that White would face the higher standard range if convicted of all charges, so counsel had not misled his client. The court sentenced White to 33 months.

White was sentenced on the controlled substances convictions on July 1, 2005. The State asked for the high end of 24 months on the methamphetamine charge, and asked the court to exercise its discretion to direct that this sentence be consecutive to the sentence for the bail jumping, given White's record including multiple felonies and 19 misdemeanor convictions that did not contribute to his offender score. Defense

counsel asked for concurrent sentences, suggesting that the additional point added to White's offender score sufficiently penalized him. Finding White's record of 26 criminal convictions over 20 years "miserable,"[4] the trial court imposed a 24-month sentence on the possession of methamphetamine charge to run consecutively to the bail jumping charge. The court imposed a concurrent sentence for the misdemeanor possession of marijuana. White appealed each judgment and sentence, and the two appeals have now been consolidated.

Sufficiency of the Evidence

White first contends the State failed to present sufficient evidence that he possessed the methamphetamine and marijuana. Evidence is sufficient if, viewed in the light most favorable to the State, any rational trier of fact could have found the defendant's guilt beyond a reasonable doubt.[5] Circumstantial evidence is no less reliable than direct evidence and all reasonable inferences are drawn in favor of the State.[6]

Contrary to White's view of the case, the State did not rely on an unsupported theory of White's constructive possession of the drugs at the time of his arrest. Rather, based on rational inferences from the evidence, the State presented a circumstantial case that White actually possessed the drugs before his arrest. The condition of the leather pouch compared to its surroundings suggested it was recently dropped, and White was the only person in the direct vicinity. The marijuana pipe on White's person

[4] RP (7/1/05) at 8.
[5] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[6] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

suggested a connection to the marijuana in the pouch. White's brief movements away from the officers after they surprised him and the darkness provided him the opportunity to discard the pouch in the location it was discovered. And one rational inference that can be drawn from White's various statements is his consciousness of guilt.

This evidence established more than the mere proximity to drugs or momentary handling of drugs in the presence of others found insufficient in the cases White cites, State v. Callahan,[7] and State v. Spruell.[8] Neither of those cases involved a defendant carrying drug use paraphernalia, disobeying a police command, or making statements like White's. The evidence was sufficient.

Ineffective Assistance

There is a strong presumption that counsel's performance was effective.[9] While this presumption may be overcome, a defendant bears the burden of showing both that his trial counsel performed deficiently and that the deficient performance prejudiced the defense.[10] To satisfy the prejudice prong of the test, a defendant must show from the record a reasonable probability that the results of the proceedings would have differed.[11]

White makes two claims of ineffective assistance. First, he contends that his counsel failed to advise him of the possibility that he could receive consecutive

[7] 77 Wn.2d 27, 459 P.2d 400 (1969).
[8] 57 Wn. App. 383, 788 P.2d 21 (1990).
[9] State v. Wilson, 117 Wn. App. 1, 16, 75 P.3d 573, rev. denied, 150 Wn.2d 1016 (2003).
[10] See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[11] State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

sentences following the severed trials and thus rendered deficient performance in assisting him in intelligently considering the State's plea offer. He contends he was prejudiced because he would have taken the State's plea offer had he known of the risks of consecutive sentences. White alternatively faults counsel for failing to move to consolidate the sentencing hearings to remove the second sentencing court's discretionary ability to impose consecutive sentences under RCW 9.94A.589(3).

As for the first claim, White likens his situation to In re Personal Restraint of McCready.[12] McCready arose from a personal restraint petition after the defendant rejected a plea bargain, went to trial on the original charges, and was convicted. A reference hearing was held and the trial court found that counsel failed to advise the defendant of the minimum term that he must serve if convicted of the original charges; thus, the defendant was unable to intelligently consider the proposed plea bargain.[13]

Here, we deal with a direct appeal, with the result that, as White admits, "this Court does not have [a] complete record of what Mr. White's attorney advised him about the potential sentencing consequences of going to trial." White nonetheless contends he can meet his burden from the existing record. He cites the first sentencing hearing, during which his counsel admitted not understanding the rule that a jury's finding of guilt counted as a point for offender score purposes, and reported that White said he would have accepted the State's offer if he had understood he faced a range of 33 to 43 months.[14] But the record discloses no discussion at either sentencing hearing

[12] 100 Wn. App. 259, 996 P.2d 658 (2000).
[13] McCready, 100 Wn. App. at 263.
[14] In his reply brief at page 5, White refers to a supposed 53-month sentence. From the record of the hearing, this appears to be a typographical error.

of what counsel did or did not tell White about the possibility of consecutive sentences.[15] And, as the trial court commented at that hearing, the pretrial record showed that White clearly had been advised of the 33 to 43-month sentencing range.

We reject the direct appeal on this issue without prejudice to White's right to timely file a personal restraint petition and seek a reference hearing if he has facts to show he is in the same position as the defendant in McCready.[16]

As for White's alternative contention that his counsel should have attempted consolidation of the sentencing hearings, to establish both deficient performance and resulting prejudice White simply asserts that such a request would likely have been granted. But trial judges generally prefer to conduct sentencing themselves after trials they have overseen because of their superior ability to gain insight into the crime and the defendant.[17] The record contains no indicia that either of White's sentencing judges would have granted such a request. As with his first claim, White has not met his burden of showing ineffective assistance from the record.

Crime Victim's Penalty Assessment

RCW 7.68.035(1)(a) provides, in pertinent part:

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[15] We note that at the second sentencing hearing, after the court indicated it was likely to impose a consecutive sentence and gave White and his counsel an additional opportunity to comment, each spoke, and neither complained of any misunderstanding about the possibility of consecutive sentences. Rather, White maintained his consistent position that he was not guilty of any of the offenses. As the State points out, one of the few things that is clear from the available record is that White's counsel had advocated that he accept the State's plea offer and White had repeatedly refused.

[16] See generally McFarland, 127 Wn.2d at 338.

[17] See Alabama v. Smith, 490 U.S. 794, 801, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) (by considering proof at trial the judge may gain "a fuller appreciation of the nature and extent of the crimes charged," and "insights into [the defendant's] moral character and suitability for rehabilitation.").

> When any person is found guilty in any superior court of having committed a crime, . . . there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

White contends that only one victim's penalty assessment was statutorily authorized for his two sentences because the charges were filed in a single information. He focuses on a portion of the statute's second sentence: "[t]he assessment shall

be . . . five hundred dollars for each case or cause of action that includes one or more convictions . . . ."[18] The plain language of the whole statute, however, does not support White's construction. First, it is the statute's first sentence, not its second sentence, which defines when the statute is operational.[19] Second, to the limited extent the second sentence of RCW 7.68.035(1)(a) could be relevant, had the Legislature intended the phrase "case or cause of action" to mean "single criminal information," it could have said so, and did not. Rather, even if "cause of action" is considered synonymous with "cause number," the statute's actual language is "case or cause of action." (Emphasis added.)

The facts before us are unusual. White committed his bail jumping and controlled substances crimes on different days in different locations. Because of

[18] RCW 7.68.035(1)(a).

[19] See State v. Humphrey, 139 Wn. 2d 53, 58, 983 P.2d 1118 (1999) (discussing difference between "whenever" and "when" in analyzing prior version of RCW 7.68.035(1)(a) to determine the statute's triggering event for retroactivity purposes).

White's motion to sever, different juries found him guilty on different days and different judges sentenced him on different days. And White's bail jumping conviction was not for failing to appear in the controlled substances case at issue in this appeal. Limiting our holding to these particular facts, we are satisfied that the statute authorized one victim penalty assessment of $500 for White's bail jumping "case," and another $500 assessment for the controlled substance "case" that included the methamphetamine and marijuana possession charges.

Pro Se Claims

White has filed statements of pro se grounds for review. His claims, however, are all either without merit or are based on matters outside the record. White's claim that a third sheriff's deputy would have provided exculpatory information in his controlled substances trial is unsupported by the record. Likewise, his conclusory complaint that his counsel did not call other witnesses for those charges fails because there is no showing in the record of what their testimony would have been. As for the bail jumping conviction, White first appears to complain that he did not knowingly fail to appear. But the statute was amended in 2001 to remove such an element.[20] If, alternatively, White is arguing the jury wrongly rejected his affirmative defense that uncontrollable circumstances prevented him from surrendering, ample evidence supported the finding. White's complaint that his counsel failed to call an unnamed witness to establish that he went to his counsel's office after missing his February 22 hearing, lacks support in the record, as does his claim that his counsel failed to call his

[20] State v. Lanphar, 124 Wn. App. 669, 674-75, 102 P.3d 864 (2004).

friend who helped with his disabled vehicle the next day. Moreover, there is no reasonable likelihood such testimony would have changed the trial's outcome in any event.

Affirmed.

FOR THE COURT:

s/ Baker, J.

s/ Appelwick, C.J.

s/ Colelman, J.